

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY

&

THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

MONDAY, THE 9TH JULY 2007 / 18TH ASHADHA 1929

MFA.No. 889 of 2000

OP(MV)NO.1022/1992 of MACT, MAVELIKKARA

APPELLANT/3RD RESPONDENT:

**THE OREINTAL INSURANCE CO. LTD.,
CHANGANASSERY REP. BY THE DEPUTY
MANAGER, MOTOR THIRD PARTY CLAIMS
CELL, M.G.ROAD, ERNAKULAM, KOCHI-35.**

BY ADV. SRI.M.JACOB MURICKAN

RESPONDENTS/PETITIONER & RESPONDENTS 1 & 2:

- 1. REGHUKUMAR, VALLYAYYATHU,
MOONNALAM, ADOOT P.O., ADOOR.**
- 2. SUNDARESAN @ PODIMON, BHANUMATHY
BHAVANAM VEEDU, ULANDADU, MEZHUVELI
VILLAGE.**
- 3. NARAYANAN NAMPOOTHIRI, KARAKOTTU
ILLOM, KAKKAMTHODU, CHANGANASSERY.**

**THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 09/07/2007, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

ORDER ON C.M.P.NO.5022/2000 IN MFA 889/2000

DISMISSED

9.7.2007

SD/-J.B.KOSHY, JUDGE

SD/-K.P.BALACHANDRAN, JUDGE

/TRUE COPY/

J.B.Koshy & K.P.Balachandran, JJ.

M.F.A.No. 889 of 2000

JUDGMENT

Koshy, J.

The Insurance Company filed this appeal contending that the Tribunal went wrong in fixing the liability on it to pay compensation, as the driver of the autorickshaw was not having a driving licence. In this circumstance, we refer to the three member Bench decision of the Apex Court in **National Insurance Co. ltd. v. Swaran Singh** (AIR 2004 SC 1531). At sub paragraphs (iii), (iv) and (vi) of paragraph 105, the Apex Court, regarding the liability of the Insurance Company, if the driver was not having a driving licence, held as follows:

"(iii) The breach of policy condition, e.g. disqualification of driver or invalid driving licence of the driver, as

contained in sub section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149(2) of the Act."

The Tribunal, in this case, with regard to the contention, held as follows:

"Third respondent has not discharged its burden to prove that the first respondent was not possessing a driving licence at the time of accident by adducing evidence to that effect. They have not adduced any evidence in this case. Hence, 3rd

respondent has failed to prove its contention. Moreover, 3rd respondent has neither pleaded nor proved that the 2nd respondent, the owner of the vehicle has entrusted the vehicle with the 1st respondent with the knowledge that the 1st respondent was not possessing a driving licence. So, I find that the 3rd respondent is liable to indemnify the 2nd respondent and pay compensation to the petitioner."

The above finding of the Tribunal cannot be interfered with in view of the decision of the Apex Court earlier mentioned. In any event, the amount ordered to be paid is only Rs.10,150/- with interest. We are of the view that no interference is required in this award.

The appeal is dismissed.

(J.B.Koshy, Judge)

9th July, 2007

(K.P.Balachandran, Judge)

tkv

J.B.Koshy & K.P.Balachandran, JJ.

M.F.A.No.889 of 2000

JUDGMENT

9th July, 2007